86 1573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONNER AIR LINES, INC.,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,
UNITED STATES SECRETARY OF TRANSPORTATION,
R. R. HAGDONE, Regional Counsel,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I

Can a Federal agency escape liability for attorney fees and expenses under the Equal Access to Justice Act when it summarily suspends a company's operations without any rational basis in law or in fact?

II

Does a court having original and exclusive jurisdiction deny due process to an applicant under the Equal Access to Justice Act when it fails to issue an opinion or otherwise make any findings of fact or conclusions of law?

PARTIES

The caption contains the name of all parties to the proceeding in the court below.

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No. ———

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OPINIONS BELOW

On April 4, 1986, the United States Court of Appeals for the Eleventh Circuit granted the emergency motion of petitioner Conner Air Lines, Inc. ("Conner") for a stay of the emergency and summary suspension of Conner's air carrier operating certificate pending review on the merits. This order is reproduced in the Appendix at page 1a. On April 16, 1986, the Eleventh Circuit denied the motion of the respondent Federal Aviation Administration ("FAA") to dissolve the stay. This order is reproduced in the Appendix at page 2a.

On November 12, 1986, the Eleventh Circuit denied, without opinion, Conner's application for attorney fees

and expenses pursuant to the Equal Access to Justice Act. This order is reproduced in the Appendix at page 3a. On December 31, 1986, the Eleventh Circuit denied Conner's motion for reconsideration. This order is reproduced in the Appendix at page 4a.

On June 2, 1986, the National Transportation Safety Board ("NTSB") issued its opinion on review of the merits of the certificate suspension. The NTSB determined that the petitioner had not violated any of the Federal Aviation Regulations alleged by the FAA and that safety in air commerce or air transportation and the public interest did not require suspension of Conner's operating certificate. This decision is not reported and is reproduced in the Appendix at pages 5a-18a. On August 6, 1986, the NTSB denied the FAA's request for reconsideration.

JURISDICTION

This Court has jurisdiction by writ of certiorari under 28 U.S.C. § 1254(1) (1982) to review the November 12, 1986 order of the Court of Appeals denying attorney fees and the December 31, 1986 order of the Court of Appeals denying reconsideration.

STATUTES INVOLVED

1. 5 U.S.C. § 504 (1982 and Supp. III 1985).
2. 28 U.S.C. § 2412 (1982 and Supp. III 1985).
3. 49 U.S.C. § 1429(a) (1982 and Supp. III 1985).
4. 49 U.S.C. § 1485(a) (1982 and Supp. III 1985).

Because of their length, the pertinent portions of the above statutes are set forth in the Appendix at pages 19a-27a.

5. 49 U.S.C. § 1486(a) (1982 and Supp. III 1985):

> (a) Orders subject to review; petitions for review
>
> Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this

chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

6. Equal Access to Justice Act, Pub. L. No. 96-481, § 202, 94 Stat. 2325 (1980):

SEC. 202. (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of this title—

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

7. 14 C.F.R. § 121.81 (1986):

§ 121.81 Inspection authority.

(a) Each certificate holder shall allow the Administrator, at any time or place, to make any inspections or tests to determine its compliance with the Federal Aviation Act of 1958, the Federal Aviation Regulations, its operating certificate and operations specifications, or its eligibility to continue to hold its certificate.

(b) In the case of a supplemental air carrier or commercial operator, these inspections and tests include inspections and tests of financial books and records, except that the Administrator does not exercise this authority with respect to the financial books and records of a supplemental air carrier if the information sought can be obtained from the Civil Aeronautics Board.

8. 14 C.F.R. § 121.380(c) (1986):

(c) The certificate holder shall make all maintenance records required to be kept by this section available for inspection by the Administrator or any authorized representative of the National Transportation Safety Board (NTSB).

STATEMENT OF THE CASE

A. The Underlying Facts

Petitioner Conner Air Lines, Inc. ("Conner") is a certified air cargo carrier. It also owns and leases aircraft used for the transportation of air cargo. Its business is operated from and is based in Miami, Florida, at the Miami International Airport. Conner has been a certified air cargo transporter for approximately forty years. During this time period, respondent, the Federal Aviation Administration ("FAA"), has conducted numerous and various inspections of Conner's operations. Conner has always cooperated with the FAA. Recognizing its

legal responsibilities, Conner has complied with all governmental laws and regulations.

Without apparent reason, the FAA began to focus an unusual amount of attention on Conner in March of 1986. For example, on March 18, 1986, a FAA inspector demanded access to records pertaining to one of Conner's DC-8 aircraft which was "in storage" and had not been operated for more than twelve months. *See* Appendix at pages 10a-11a. The inspector made this demand although it was well known that the aircraft could not be operated due to a technological inability to meet the FAA's noise abatement requirements.

Conner questioned the need for an immediate inspection of the records of an "in storage" aircraft. The FAA decided that Conner was being uncooperative. Consequently, the FAA immediately subjected Conner to a full scale record inspection of all of Conner's records for all of its aircraft. The inspection was to be performed by a team of four inspectors. Although the FAA's reaction to the situation alarmed Conner, the company agreed to cooperate, and the inspection was scheduled for March 24, 1986.

Due to the unusual facts and circumstances surrounding the scheduling of the inspection, plus the fact that the inspection was to be conducted by four inspectors instead of the normal single inspector, Conner was reasonably concerned by the FAA's conduct. Conner believed that a reasonable way to protect the company's interest was to make an audio and video tape recording of the inspection process. Upon reviewing the matter with legal counsel, Conner was advised that the regulations did not restrict his ability to record the inspection process.

At approximately 9:00 a.m. on March 24, 1986, the FAA inspection team arrived at the Conner facility. They were advised by Conner that due to the unusual nature of the inspection, and Conner's concern about harassment by the FAA, the inspection process would

be recorded. Conner asked the inspection team leader if he had any objection to the recording. The team leader advised that he had no objection to taping, provided the FAA could also make a similar tape recording. The FAA did not, however, have an audio tape recorder. Therefore, Conner made one available to them. The inspection process commenced with Conner audio and video taping, while the FAA only audio taped. The inspection process continued unimpeded for approximately three hours until the FAA team of inspectors left at noon for lunch.

Upon the FAA inspectors' return from lunch at approximately 1:00 p.m. on March 24, 1986, the inspection team leader made an oral objection to the video taping. It is unclear what caused the FAA inspection team to raise this objection at that point in time. Conner was advised that the inspection process would be terminated unless the video taping was discontinued. Conner refused to discontinue the video taping. However, Conner did not impede the access of the FAA inspectors to the records in any manner. The FAA inspectors voluntarily elected to terminate their inspection, and they left the Conner facility.

The following day, March 25, 1986, a letter was hand delivered to Conner by the FAA which "respectfully requested that no taping (audio, video or any other form) be conducted while FAA inspectors are conducting FAA-related activities (inspection of aircraft records) on your premises." Conner replied that "we will in no way impede your inspection of aircraft records on our premises. On the other hand, we will protect ourselves by audio and video taping every possible moment you are on our premises."

On March 26, 1986, Conner was contacted by the FAA and was informed that the FAA would be sending Conner a "letter of investigation" regarding possible violations of the Federal Aviation Regulations resulting from Con-

ner's tape recording of the FAA inspection. This was the first notice to Conner that the FAA intended to equate an insistence on tape recording with a "refusal" to allow an inspection. This came as a shocking surprise to Conner. During Conner's 40 years of operation, the company had experienced no safety problems whatsoever. In addition, none of the recent flurry of inspection activity of Conner's facilities by the FAA had led to any allegations of regulatory violations. *See* Appendix at pages 12a-13a, n. 10 and n. 12.

Based upon the FAA's representation, Conner expected to receive a "letter of investigation" which would give Conner an opportunity to respond to the FAA's charges. Conner did receive a hand-delivered letter which arrived some time after 3:00 p.m. on March 26, 1986. The letter alleged that Conner had violated 14 C.F.R. § 121.81 and Section 609 of the Federal Aviation Act of 1958, 49 U.S.C. § 1429. In addition, the letter stated that the FAA would initiate "immediate enforcement action against your aircraft and air carrier operating certificate." At approximately 6:30 p.m. on March 26, 1986 (three hours after the so-called "letter of investigation" was delivered), the FAA hand-delivered an emergency order of suspension, which arbitrarily required Conner to immediately cease all operations.

B. The Stay By The Court Of Appeals

Due to the FAA's election to suspend Conner's certificate on an *emergency* basis, Conner had a right to immediate judicial review under 49 U.S.C. § 1486(a). Normally, FAA certificate actions are not issued on an emergency basis and the effect of the certificate action is stayed pending the normal appeal process before the NTSB. However, 49 U.S.C. § 1429(a) gives the FAA authority to declare an emergency and have the certificate action take immediate effect despite an appeal to the NTSB. Moreover, while the NTSB will review an

emergency case on its merits, the NTSB does not have jurisdiction to examine the propriety of the FAA's use of its emergency authority. *Nevada Airlines, Inc. v. Bond*, 622 F.2d 1017, 1020 n. 4 (9th Cir. 1980).

The FAA's decision to declare an emergency is a final administrative determination, not reviewable by the NTSB. The United States Courts of Appeals are the only avenue of redress for a company forced by the FAA to immediately cease operations. Faced with this situation, Conner simultaneously pursued its two available remedies. In addition to seeking review on the merits by the NTSB, Conner filed an emergency motion for a stay pending review with the United States Court of Appeals for the Eleventh Circuit.

Jurisdiction for the judicial relief sought by Conner on the emergency order lies with the United States Court of Appeals. *See* 49 U.S.C. § 1486(a). *See also, Nevada Airlines, Inc. v. Bond*, 622 F.2d 1017 (9th Cir. 1980). The standard of review is a stringent one. The party seeking judicial relief must show that the FAA decision to declare an emergency was a clear error of judgment lacking any rational basis in fact. *Id.* at 1021. Indeed, Conner knows of no prior case in which a court has stayed a FAA emergency action.

Conner's motion was granted by the court and Conner was allowed to continue operations during the NTSB review process. Moreover, the court reaffirmed its ruling when the court refused the FAA's request to dissolve the stay. The stay granted in Conner's case is the first time that a FAA emergency order has ever been stayed. Therefore, it can logically be concluded that the FAA's abuse of its emergency authority was of historic proportions. It clearly was error and lacked any rational basis in fact. As such, the FAA's action was not substantially justified.

C. The Proceedings Before The National Transportation Safety Board

The administrative review on the merits of the FAA's suspension action before the NTSB resulted in a reversal of the FAA's suspension order. The NTSB held that Conner "did everything that the cited [Federal Aviation Regulations] required it to do and nothing that any regulation proscribed it from doing." *See* Appendix at page 17a. The NTSB ruled that the FAA had no legal basis to suspend Conner's certificate. The FAA could not identify any statutes or regulations upon which it could justify its actions. The NTSB concluded that Conner's insistence on recording was the FAA's sole reason for issuing the emergency order of suspension and this insistence by Conner did not constitute a violation of any law or regulation. Consequently, its action declaring an "emergency" was not justified. Specifically, the NTSB stated:

> [Conner] gave the [FAA] full access to the requested records on the day the [FAA] scheduled for the inspection. *The regulations relied on by the [FAA] required no more.* In addition, the regulations as written do not circumscribe in any way what respondent can do on its own premises during the [FAA's] examination of its records. In this case *the [FAA] has attempted to rewrite the regulations and apply them retroactively* to prohibit [Conner] from doing something that was not expressly or by clear implication forbidden by the rules.

Appendix at page 15a (emphasis added).

D. The Application For Attorney Fees

Having prevailed on the merits of the action before the NTSB, as well as the Eleventh Circuit, Conner filed applications in both forums for the costs and attorney fees it incurred under the Equal Access to Justice Act.

28 U.S.C. § 2412 and 5 U.S.C. § 504 ("EAJA"). The application for attorney fees before the NTSB is pending. The application for attorney fees before the Eleventh Circuit was denied by the court on November 12, 1986. No opinion or findings were issued by the court. Conner's motion for reconsideration of that decision was denied by the court on December 31, 1986.

The FAA's response to the application for fees and expenses conceded that Conner is eligible under the EAJA to recover legal fees and costs; that Conner is a prevailing party as defined in the EAJA; and that Conner's challenge of the "emergency" designation before the Eleventh Circuit was a proceeding covered by the EAJA. The only defense raised by the FAA was that its position was "substantially justified" and that "special circumstances would make an award unjust." The Eleventh Circuit's summary decision denying attorney fees and costs to Conner does not include any findings of fact or conclusions of law. The lack of a written finding defining its reasons for the denial leaves Conner with imaginary assumptions as to the reasons why appropriate judicial relief was not granted as required by the EAJA.

BASIS FOR GRANTING THE WRIT

A. This Court's Power Of Supervision Is Required Because The Court Of Appeals Allowed The Agency To Escape Liability For Attorney Fees Even Though The Agency Summarily Suspended The Company's Operations Without Any Rational Basis In Law Or Fact

The FAA's suspension of Conner's operating authority could have been accomplished either on a regular basis or on an emergency basis. 49 U.S.C. § 1429(a). Had the FAA not elected to take the action on an emergency basis, the proceedings before the Court of Appeals which give rise to the petition to this Court would never have occurred. Ordinarily, certificate suspensions are auto-

matically stayed during the statutory administrative review process. This is not so if the FAA designates the action as an emergency.

> The filing of an appeal with the National Transportation Safety Board shall stay the effectiveness of the Secretary of Transportation's order unless the Secretary of Transportation advises the National Transportation Safety Board that an emergency exists.

49 U.S.C. § 1429(a). Consequently, Conner was forced to either cease operations or seek relief from the Court of Appeals. Thus, the attorney fees and expenses Conner seeks to recover would never have been incurred had the FAA not categorized its order as an emergency.

By granting a stay, the Court of Appeals concluded that the FAA had abused its emergency authority in that no emergency existed. For a court to reach this result, a carrier such as Conner "must demonstrate a substantial likelihood that the determination was a clear error of judgment lacking any rational basis in fact." *Nevada Airlines, Inc. v. Bond,* 622 F.2d 1017, 1021 (9th Cir. 1980).

The burden to be met for a stay is a heavy one. In fact, Conner is unaware of any prior case in which such a stay has been granted by any of the United States Courts of Appeals. In light of this, the granting of Conner's stay demonstrates that the FAA's use of its emergency authority here was so totally inappropriate that the Court of Appeals was able to recognize it as an immediately voidable action.

A cursory examination of the FAA's suspension order (Appendix at pages 6a-9a) reveals that no "emergency" existed. The order states that Conner refused to allow an examination of its records by insisting upon recording

the examination. No other emergency condition or safety problem existed. Life or limb was not in jeopardy.

The emergency authority granted the FAA by Congress confers upon the FAA plenary authority over certified carriers such as Conner. Congress specifically intended the authority to be used solely in serious safety-related circumstances when ". . . an emergency requiring immediate action exists in respect of safety in air commerce . . ." 49 U.S.C. § 1485(a). Emergency authority was never intended for any use other than to prevent an immediate risk to safety. It follows that the emergency authority cannot be used to prevent the video taping of a records inspection when such video taping does not interfere with that inspection.

Having been forced to expend monies litigating before the Court of Appeals due to the FAA's arbitrary use of its emergency authority, Conner sought reimbursement from the FAA by filing an application for attorney fees and expenses under the EAJA. In response to this application, the FAA conceded that Conner meets all of the prerequisites for an award of attorney fees under the EAJA. The FAA's opposition to Conner's application was based solely upon the contention that the agency's position was "substantially justified" and that "special circumstances" exist which would make it unjust for an award of fees and costs to be made under the circumstances. The court's November 12, 1986 ruling on the EAJA application and the court's December 31, 1986 denial of reconsideration do not provide any rationale whatsoever for the denial. Without knowing the court's reason for denying the EAJA application, Conner merely must presume that the court accepted the FAA's position that the agency's action was "substantially justified."

In the absence of a written opinion from the Court of Appeals giving its rationale, Conner can only proceed on the basis of the factual determinations made by the

NTSB in its detailed decision. Appendix at pages 5a-18a. The essence of the FAA's untenable position in the litigation before the court is exemplified by the FAA's lack of a legal or statutory basis for issuing the suspension order as an emergency order. The FAA gave no reason for the "emergency" designation other than what is contained in the order itself. It did not and could not proffer any statutory or regulatory justification for its actions. Neither 49 U.S.C. §§ 1429(a) and 1485(a) nor 14 C.F.R. §§ 121.81 and 121.380(c), which were the authorities cited by the FAA in its order, prohibited Conner's actions or could be used as a basis for the FAA's emergency order of suspension.

For purposes of determining whether the agency's position was substantially justified, the test is one of reasonableness, depending upon all of the pertinent facts in a given case. The essential issue of the reasonableness of the government's position must be evaluated, not only from the litigation position, but also from the totality of the circumstances in prelitigation and during trial. *Wolverton v. Heckler*, 726 F.2d 580 (9th Cir. 1984). *See also Donahue v. Heckler*, 600 F.Supp. 153 (D.C. Wisc. 1985).

It has been recently decided by the Court of Appeals for the District of Columbia Circuit that:

> A court in ruling on an EAJA application must determine whether the Government's "position" is "substantially justified." *This necessarily requires the court to examine through an EAJA prism both the Government's litigation position and the conduct that led to litigation.* After doing so, the court must then reach a judgment independent from that of the merits phase. The judgment is whether the Government's actions were slightly more than reasonable.

Federal Election Commission v. Rose, 806 F.2d 1081, 1090 (D.C. Cir. 1986) (emphasis added), *citing* 28 U.S.C. § 2412(d)(2)(D).

The court in *Rose* reasoned that an "arbitrary and capricious" label does not necessarily lead to the conclusion that the agency action was not "substantially justified." After noting that the "arbitrary and capricious" label is just a label, it went on to state that:

> By creating in EAJA a distinct legal standard—"substantially justified"—Congress has expressed its intent that after every sort of merits determination, including a determination that agency action descended to the depths of "arbitrary and capricious" conduct, the *court entertaining an EAJA application is obliged to reexamine the facts* under a different legal standard to determine whether that conduct is slightly more than reasonable.

Id. at 1089 (emphasis added).

The FAA's issuance of an emergency order entirely without color of authority and without any regulatory standard was not only unreasonable *per se*, but also premised on bad faith. For purposes of awarding attorney fees based upon bad faith on the part of the government, the bad faith may involve either the actions that led to the lawsuit or the conduct of the litigation. *McQuiston v. Marsh*, 707 F.2d 1082 (9th Cir. 1983). Here the FAA reacted to an action taken by Conner to preserve the record of what Conner perceived to be a bad faith inspection process. The FAA's response was a punitive action against Conner.

It would be difficult to conjure a more blatant abuse of statutory authority than that committed by the FAA in this case. This is exactly the type of abuse which Congress intended to prevent by enacting the EAJA. It was meant to be a deterrent against unreasonable and abusive governmental action. Specifically, Congress determined that:

> Certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

Equal Access to Justice Act, Pub. L. No. 96-481, § 202 (a), 94 Stat. 2325 (1980).

The court assessing an EAJA application must deny with the clear abusive action of the agency beyond the pale of the law, serves to deprive Conner of the protection provided to it by Congress in the EAJA. To allow the type of abusive, punitive and vindictive action taken by the agency in this case would have a chilling effect on the goals and intent of the EAJA.

B. This Court's Power Of Supervision Is Required Because The Court Of Appeals Has Denied Conner Due Process By Failing To Issue An Opinion When Ruling On An Equal Access To Justice Act Application Where The Court Of Appeals Had Original And Exclusive Jurisdiction

When a court reviews an application filed pursuant to the EAJA, Congress intended that a discrete legal standard be applied and that an independent evaluation through an EAJA perspective be conducted. *Rose*, 806 F.2d at 1087. In *Rose*, the court specifically stated:

> The court assessing an EAJA application must deny costs and fees if, on the basis of this independent perspective, it concludes that the Government acted slightly more than reasonably, even though not in compliance with substantive legal standards applied in the merits phase. Only through a fresh look occasioned by application of the "substantially justified" standard can the court honor Congress' intent, manifest in the inclusion of this standard, not to permit a prevailing party automatically to recover fees.

Id. It is precisely the Eleventh Circuit's failure to conduct this independent evaluation in this case which denied Conner due process.

In *Matter of Esmond*, 752 F.2d 1106 (5th Cir. 1985), two individuals sought an award of attorney fees under the EAJA for fees they incurred in responding to and handling a meritless bankruptcy claim filed by a governmental agency. After recognizing that the government carries the burden of proving that its actions were substantially justified and reasonable, the court noted that there was nothing in the record to show that the governmental agency involved had met this burden because the agency had not filed any response to the EAJA application. The Fifth Circuit stated that "the bankruptcy court made no explicit finding of fact or ruling on why it was denying attorney's fees. Rather than infer a finding of substantial justification, considering the total lack of evidence regarding this issue, this Court remands to the bankruptcy court to give the parties an opportunity to present their evidence on this issue and have that court make a specific finding on this issue of whether the [governmental agency] was substantially justified in filing its [claim]." *Id.* at 1109. The circuit court's failure to make the necessary findings of fact similarly prevents this Court or any of the parties from making any inferences regarding the issue of substantial justification.

In *United States v. 341.45 Acres of Land*, 751 F.2d 924 (8th Cir. 1984), the court considered the applicability of the EAJA to a group of consolidated property condemnation cases. The Eighth Circuit recognized that the substantial justification of the government's position depended upon whether the government's refusal to offer more money to the property owners as just compensation had a reasonable basis in law and in fact. As the court held, "because we cannot determine from the record on appeal whether the government's position in each case was substantially justified, we remand the cases to the

district court for further proceedings. On remand the district court should determine whether the government's position was substantially justified by considering the totality of the circumstances [sic] prelitigation and during trial." *Id.* at 940. The district court's failure to make the appropriate findings of fact are what required the remand. Similarly, the Eleventh Circuit's failure to make specific findings of fact and conclusions of law in Conner's case also requires a remand.

The Eleventh Circuit itself has recognized the validity of this principle. In *National Treasury Employees Union v. Internal Revenue Service*, 735 F.2d 1277 (11th Cir. 1984), the court considered an application for attorney fees under the EAJA by a taxpayer. The underlying claim on the merits was settled by the parties and a consent agreement setting forth the terms of the settlement was approved by the district court. With regard to the EAJA application, the district court refused to award attorney fees because the settlement decree made no mention of fees and costs. On appeal, the Eleventh Circuit remanded the case to the district court for a determination of the controlling facts. The Eleventh Circuit specifically noted that "until the facts are fully developed either by an evidentiary hearing or a stipulation by the parties, neither of the parties is in a position to argue, nor is the court in a position to decide, the legal consequences which flow from the party's conduct in the case." *Id.* at 1279. The Eleventh Circuit further determined that the district court's failure to make the necessary findings of fact constituted an abuse of discretion. *Id.* at 1278.

Similarly, the Eleventh Circuit abused its discretion by only issuing a one-line summary denial of Conner's EAJA application. No findings of fact or conclusions of law were issued on the determination of whether or not substantial justification or special circumstances existed which would warrant the denial of the application. The

applicable standard to make findings of fact and conclusions of law cannot be applied differently because here the Eleventh Circuit, as opposed to a Federal district court, was the court of original jurisdiction for this matter.

CONCLUSION

For the reasons outlined above, the petition for the writ of certiorari should be granted or, in the alternative, the court should either remand to the circuit court for further proceedings or summarily reverse the circuit court's order.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5213

CONNER AIR LINES, INC.,
Petitioner,

versus

FEDERAL AVIATION ADMINISTRATION,
UNITED STATES SECRETARY OF TRANSPORTATION,
R. R. HAGDONE, Regional Counsel,
Respondent.

On Petition for Review of an Order of
the Federal Aviation Administration

[Filed Apr. 4, 1986]

Before FAY, JOHNSON, and CLARK, Circuit Judges.

BY THE COURT:

Petitioner's emergency motion for stay pending review is GRANTED until further order of this Court. The stay is not to interfere with the scheduled administrative hearing.

Judge Johnson would deny the request for stay.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5213

CONNER AIR LINES, INC.,
Petitioner,

versus

FEDERAL AVIATION ADMINISTRATION,
UNITED STATES SECRETARY OF TRANSPORTATION,
R. R. HAGDONE, Regional Counsel,
Respondent.

Appeal from the United States District Court for
the Southern District of Florida

[Filed Apr. 16, 1986]

Before FAY, JOHNSON, and CLARK, Circuit Judges.

BY THE COURT:

Respondent's emergency motion to dissolve stay of the order of suspension is DENIED.

Judge Johnson would grant the motion and dissolve the stay.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5213

CONNER AIR LINES, INC.,
Petitioner,

versus

FEDERAL AVIATION ADMINISTRATION,
UNITED STATES SECRETARY OF TRANSPORTATION
and R. R. HAGDONE, Regional Counsel,
Respondents.

On Petition for Review of an Order of the
Federal Aviation Administration

[Filed Nov. 12, 1986]

Before: FAY, JOHNSON and CLARK, Circuit Judges.

BY THE COURT:

Petitioner's motion for attorney's fees and expenses pursuant to the Equal Access to Justice Act is denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5213

CONNER AIR LINES, INC.,
Petitioner,

versus

FEDERAL AVIATION ADMINISTRATION,
UNITED STATES SECRETARY OF TRANSPORTATION
and R. R. HAGDONE, Regional Counsel,
Respondents.

On Petition for Review of an Order of the
Federal Aviation Administration

[Filed Dec. 31, 1986]

Before: FAY, JOHNSON and CLARK, Circuit Judges.

BY THE COURT:

Petitioner's motion for reconsideration of this Court's Order of November 12, 1986, is denied.

SERVED: June 2, 1986

NTSB Order No. EA-2335

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
Washington, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 2nd day of June, 1986

Docket SE-7342

DONALD D. ENGEN, Administrator,
Federal Aviation Administration,
Complainant,

v.

CONNER AIR LINES, INC.,
Respondent,

OPINION AND ORDER

Respondent is appealing from the oral initial decision of Administrative Law Judge Joyce Capps, wherein she affirmed the Administrator's order suspending respondent's air carrier operating certificate and suspending the airworthiness certificate of its six aircraft.[1] The Ad-

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[1] An excerpt from the hearing transcript containing the initial decision is attached.

ministrator's March 26, 1986, emergency[2] order of suspension reads in pertinent part as follows:

1. Conner Air Lines, Inc. holds Air Carrier Operating Certificate Number SO-268.

2. Conner Air Lines, Inc. is the owner or operator of the following aircraft, each of which is listed on the Conner Air Lines operations specifications:

Registration Number	*Aircraft Type*
N28CA	DC-6B
N37577	DC-6B
N162CA	DC-8-62
N53CA	DC-8-33
N163CA	DC-8-62
N614CA	DC-6A

3. On or about March 18, 1986, representatives of the FAA Administrator (hereinafter referred to as "the Administrator") attempted to conduct an inspection of civil aircraft N53CA.

4. As part of the inspection, the Administrator requested that the maintenance records of N53CA be produced for inspection.

5. F.A. Conner refused to allow the Administrator to review the records of N53CA.

6. On or about March 21, 1986, the Administrator delivered to F.A. Conner a letter dated March 20, 1986, which reads as follows:

   Pursuant to Federal Aviation Regulations 121.81 and 121.380(c), please make available the maintenance records on the following aircraft listed on

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[2] On April 4, 1986, the United States Court of Appeals for the Eleventh Circuit stayed the emergency nature of the Administrator's order (No. 86-5213).

you [sic] Operations Specifications: N28CA, N37577, N162CA, N53CA, N163CA and N614CA.

Records should contain the following:

1. Aircraft Records
2. Inspection Records
3. Engine Records
4. Propeller Records
5. AD Records
6. Aircraft Flight Logs

Please be advised we will expect these records be made available at your facility for our inspection on March 24, 1986.

7. When the Administrator appeared at Conner Air Lines on March 24, 1986 to perform the above-described inspection, Conner Air Lines refused to allow the Administrator to conduct the inspection except in the presence of audio and videotape equipment during all phases of the inspection.

8. By letter dated March 25, 1986, Conner Air Lines was advised by the Administrator that the presence of audio and video taping equipment and the use of that equipment interfered with and obstructed the inspection being attempted, and Conner Air Lines was asked to remove that equipment so that the inspection could be conducted.

9. Upon receipt of the March 25 letter, Conner Air Lines refused to remove the video and audio recording equipment and advised the Administrator that the equipment would remain on during any inspection.

10. On or about March 26, Conner Air Lines was advised that refusal to remove the video and audio tap-

ing equipment constituted a refusal to allow the representatives of the Administrator to conduct his inspection.

11. The above-described actions of Conner Air Lines constitute refusal to permit the Administrator to conduct an inspection of the Airline and its aircraft.

12. As of this date, Conner Air Lines continues to refuse to permit the inspection of the Airline and its aircraft.

As a result of the foregoing, Conner Air Lines has violated and continues to violate the following sections of the Federal Aviation Regulations:

1. Section 121.81 by not allowing, and in fact refusing to the Administrator the right to make the inspections of Conner Air Lines and the aircraft on the operations specifications it has been issued under Part 121 of the Federal Aviation Regulations (FAR).

2. Section 121.380(c) by refusing to make the aircraft maintenance records required by Sections 121.380 of the Federal Aviation Regulations available to the Administrator for inspection.[3]

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[3] Section 121.81 states in pertinent part:

"§ *121.81 Inspection authority.*

(a) Each certificate holder shall allow the Administrator, at any time or place, to make any inspections or tests to determine compliance with the Federal Aviation Act of 1958, the Federal Aviation Regulations, its operating certificate and operations specifications or its eligibility to continue to hold its certificate."

Section 121.380(c) states:

"*121.380 Maintenance recording requirements.*

* * * *

(c) The certificate holder shall make all maintenance records required to be kept by this section available for inspection by

NOW, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator by Sections 609(a) and 1005(a) of the Federal Aviation Act of 1958, that Conner Air Lines' Air Carrier Operating Certificate No. 268 be, and hereby is, suspended for a period of five (5) days, said suspension to continue in force thereafter until Conner Air Lines permits the Administrator to conduct inspections in a free and uninterrupted manner, including the absence of video and/or audio taping of inspectors while conducting the inspections. In addition, IT IS ORDERED, that the airworthiness certificates of civil aircraft N28CA, N37577, N162CA, N53CA, N163CA and N614CA, be and hereby are,

suspended until such time as Conner Air Lines permits the Administrator to conduct inspections in a free and uninterrupted manner, including the absence of video and/or audio taping of inspectors while conducting the inspections, and to continue until the above described aircraft are determined by the Administrator to meet applicable airworthiness standards.[4]

In his brief, respondent contends that his "request" that the March 18, 1986, inspection be conducted on a subsequent day did not constitute a violation of the two FARs. Respondent also contends that the Administrator has failed to define a specific standard which puts operators on notice that the tape recording of inspections will result in punitive actions, and respondent's insistence on tape recording the March 24, 1986 inspections did not constitute a violation of the cited FARs. Finally,

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the Administartor or any authorized representative of the National Transportation Safety Board (NTSB)."

[4] In editing her decision, the law judge changed the Administrator's order to add the requirement that respondent permit the Administrator to conduct unconditional inspections.

respondent argues that the law judge erred by basing her decision substantially on general policy considerations rather than on an analysis restricted to the facts relevant to whether respondent violated the FARs.

The Administrator has filed a reply brief opposing the appeal and urging affirmance of the initial decision.[5]

Upon consideration of the briefs of the parties and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order.[6] We are reversing the law judge's findings that respondent violated the FARs by unobtrusively recording the Administrator's inspection of respondent's records at its place of business.

The facts in this case are largely undisputed. On March 18, 1986, Mr. Paul Franklin, an Assistant Principal Maintenance Inspector with the Miami Flight Standards District Office, performed a ramp inspection on N53CA, a DC-8 listed on respondent's Operations Specifications. Inspector Franklin noted several discrepancies during a visual inspection of the aircraft, concluded that the aircraft had been in storage for some time and was not being properly stored. Inspector Franklin was advised by Mr. Matthew Jablonowski, respondent's Director of Quality Control, that the aircraft was in storage because it did not have a noise

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[5] The Administrator has filed an opposed motion to strike from respondent's appeal brief quotations from and references to FAA orders generally pertaining to enforcement and inspection matters. Neither the orders nor the quoted excerpts were offered in evidence at the hearing by respondent's attorneys, and they will not be considered on appeal. *Administrator* v. *Cunningham*, Order EA-2199, served July 31, 1985.

[6] Respondent's request for oral argument is denied. The issues have been thoroughly developed in the parties' briefs. 49 C.F.R. § 821.48(g).

exemption.[7] Mr. Jablonowski furnished Inspector Franklin records on this aircraft's current maintenance status, which reflected, among other things, that it had not been operated for months. Inspector Franklin did not suspect that respondent was going to operate N53CA, but he explained that aircraft identified on the Operations Specifications are to be maintained in an airworthy condition, which he did not believe was the case for N53CA. Inspector Franklin, therefore, asked to see the other maintenance records on the aircraft. Mr. Jablonowski was responsible for maintaining the records on respondent's aircraft but he directed Inspector Franklin to Mr. Conner, respondent's President and General Manager, who had the key to the lock which secured the additional records.

Inspector Franklin returned on the afternoon of March 18 and asked Mr. Conner for the records on N53CA. Mr. Conner questioned the purpose of this inspection, and Inspector Franklin told him that N53CA was not stored properly. Mr. Conner reiterated that the aircraft was grounded and stated that he knew of no regulation governing the storage of planes, but if Inspector Franklin would cite such a regulation, he would certainly comply with it.[8] Mr. Conner noted that respondent's manual which had been approved by the FAA only addressed returning stored aircraft to service, and Inspector Franklin felt that this provision was not enough. When Inspector Franklin asked Mr. Conner when would be a convenient time to see the records for N53CA, Mr. Conner responded "Never." After Inspector Franklin displayed his credentials and cited the regulations that authorized him to see the records, Mr. Conner replied "Next year."

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[7] Noise rules are set forth in Subpart E of 14 C.F.R. 91 and 14 C.F.R. Part 36.

[8] Although Inspector Franklin testified that aircraft manufacturers usually provide storage procedures in their manuals, he was unable to find any storage requirements in the manual he had.

On March 19, Inspector Franklin along with another inspector again visited respondent's place of business. Mr. Conner stated that he could not produce the records because he did not have any available personnel to assist the inspectors,[9] and he agreed to provide the records on March 21. Inspector Franklin returned to his office and recommended to his supervisor that they expand the inspection to cover all records for all six of respondent's aircraft, reasoning that if N53CA was not being properly maintained the remaining aircraft might not be as well. By letter dated March 20, 1986, respondent was advised to make available on March 24 at its facility six categories of maintenance records for all six aircraft on its Operations Specifications. Mr. Conner not only agreed to the inspection but also welcomed it because respondent theretofore had always passed inspections.[10]

Before the inspection, Mr. Conner consulted an attorney who advised him that he had a right to tape the FAA inspection. When the FAA team of four inspectors arrived at respondent's premises on the morning of March 24, Mr. Conner told them that he intended to record the session. The team leader said that he had no objection and that he too would like to do the same thing. The team leader accepted Mr. Conner's offer of an audio recorder. Some of the team members noticed but paid little attention to a tripod-mounted video camera that was aimed at the front of the chairs that were lined up at the conference table they were using for the examina-

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[9] The Administrator's Complainant does not rely on or cite these events on March 19.

[10] Mr. Conner testified without refutation by the Administrator that respondent had successfully completed two years under the National Air Transportation Inspection program, had been notified by the FAA in early March 1986 that its records and operations were in good shape and had been assured that it was not on the so-called hit list.

tion of the records.[11] Mr. Jablonowski periodically changed the tapes in the video and audio recorders in the presence of the inspectors. During the lunch break, the team leader learned that respondent may have been video taping the inspection, and when questioned, Mr. Conner readily admitted to having video taped the inspection. The team leader objected to the video recording—he did not want his face on respondent's film—and informed Mr. Conner that he was going to leave if Mr. Conner did not turn off the camera. Mr. Conner did not shut off the camera and the inspection team departed.[12]

The team leader's March 25 letter requested that respondent conduct no taping (audio or visual) while the team inspected the aircraft records on respondent's premises. Mr. Conner's March 25 written reply noted that respondent would in no way impede the FAA's inspection of aircraft records on its premises and that respondent would audio and video tape all of their activities.[13] This stalemate led to the March 26, 1986, emergency order of suspension.

The law judge in effect found that on March 18, 1986, respondent refused to allow the Administrator to review records of N53CA. There is support in the record for that view. It is uncontroverted that Inspector Franklin inspected some records on N53CA and asked Mr. Jablonowski for certain additional maintenance records on N53CA which Mr. Jablonowski said he did not have ac-

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[11] The camera was located adjacent to a wall along the side of the table. (Ex. R-1.)

[12] The record does not disclose that the respondent's records which were examined on the morning of March 24 were not in order or reflected any violation or potential violation of the FARs.

[13] On March 25, the principal *operations* inspector assigned to respondent performed an inspection on respondent's premises. Mr. Conner had a conversation with this investigator but did not record his activities.

cess to, that Mr. Jablonowski referred Inspector Franklin to Mr. Conner for other records, and that Mr. Conner did not grant Inspector Franklin immediate access to those records. On the following day, however, Mr. Conner agreed to produce these records for Inspector Franklin. Mr. Conner's agreement the next day to produce the records, on Inspector Franklin's renewed request, strongly suggests that Mr. Conner did not intend, despite his literal language, to deny the inspector access to the records. In any event, it is clear that respondent's initial refusal to make available some maintenance records on the stored aircraft was not the basis for the emergency suspension order, and we will not impose any sanction for this violation. Mr. Conner readily agreed the following day to make the records available; the records pertained to a stored aircraft that had not been operated for months, was not being operated, and the inspector did not suspect that it was going to be operated; and before this aircraft could be returned to service, respondent would be required by its FAA-approved manual to perform certain procedures. Mr. Conner's initial refusal to produce the records on this stored aircraft also may have been prompted in part by Inspector Franklin's erroneous view that the manufacturer's manual for this aircraft contained guidelines on the storage of aircraft. The Administrator's emergency order of suspension was not precipitated by respondent's temporary denial of access to the records on N53CA but instead was precipitated by respondent's desire to audio and video tape the team inspection of the maintenance records for all its aircraft.

We turn now to the key issue and the heart of the Administrator's case, i.e., whether respondent's action in providing the Administrator with complete access to all of the requested records while insisting that the Administrator's inspection on its premises would be recorded was a refusal both to allow the inspection and to make

the records available. This issue presents a purely legal question of regulatory interpretation and application which has not been addressed by the Board in any case cited by the parties or which we have found.

Respondent gave the Administrator full access to the requested records on the day the Administrator scheduled for the inspection. The regulations relied on by the Administrator required no more. In addition, the regulations as written do not circumscribe in any way what respondent can do on its own premises during the Administrator's examination of its records. In this case, the Administrator has attempted to rewrite the regulations and apply them retroactively to prohibit the respondent from doing something that was not expressly or by clear implication forbidden by the rules. The "absence of a provision stating, or providing a basis for an unquestionable inference, that" certain conduct is proscribed warrants the reversal of the Administrator's order. *Pike* v. *C.A.B.*, 303 F.2d 353, 357 (8th Cir. 1962)

The fundamental purpose of requiring operators of aircraft to make records available for inspection is to enable the Administrator to see firsthand what the records reflect in order to determine that an operator is complying with, among other things, the FARs. The Administrator's ability to visually examine the contents of respondent's records was not impeded by respondent's use of recorders. Moreover, the Administrator does not take the position that the existing FARs empower him to oust an operator from any part of the operator's business establishment during a records inspection. The Administrator has not explained what additional intrusion the audio and video recording conducted herein would impose beyond the not unauthorized presence of the operator's representative while an inspection is in progress.[14]

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[14] In affirming the Administrator's interpretation of §§ 121.81 and 121.380, the law judge relied on the Administrator's need to

In any event, the Administrator's own agents voiced no objection to respondent's audio taping the examination of records, and the fact that an experienced team leader consented to such a recording would at least suggest that the team was not being prevented from performing a meaningful inspection. To be sure, the inspectors testified that as a result of the audio recording they decided not to discuss their findings or conclusions until after they left respondent's premises, but this modification in their usual practice has more to do with how they conduct their investigations and not whether the records were there for them to inspect, the obligation imposed on the operator by the regulations at issue here.[15]

The Administrator's reliance on cases dealing with access to the observer's seat for en route inspections is misplaced. The regulations relevant to the cockpit access cases cited by the Administrator provide that "the inspector must be given free and uninterrupted access" to the cockpit (14 C.F.R. § 121.548) and "the forward observer's seat or the observer's seat selected by the Administrator must be made available". 14 C.F.R. § 121.581

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have contemporaneous confidential discussions during a team inspection. But the Administrator has not put operators on notice that he would demand such confidentiality or that the failure to honor a request for such confidentiality would be enforceable through certificate action. The Administrator's counsel stated that the FAA could have removed the records from respondent's facility to the inspectors' offices, but he did not know why that was not done in this case. If the inspectors believed that audio or video taping would compromise their inspection, they had the alternative of taking the records with them in lieu of trying to resolve the impasse by resort to emergency certificate action.

[15] The inspectors expressed concern that the video camera could have been used to zero in on their notes. This is pure speculation. The Administrator apparently never requested a copy of the video tape to try to determine what it captured. The Administrator also failed to offer any evidence on the capability of the unmanned camera and did not interrogate respondent's witnesses on the ability of the camera to "read" notes.

(b). By failing to provide the observer's seat of choice to the inspector, the certificate holder was violating an express requirement of the regulation. *See, e.g., Administrator* v. *Crim*, 3 N.T.S.B. 2471 (1980). In this case, by contrast, respondent provided the Administrator with everything he was requested or required to produce, pursuant to a regulation which unlike § 121.548 does not contain the term "free and uninterrupted". In any case, there is no showing that the presence of the recording equipment precluded a "free and uninterrupted" inspection of records as purportedly required by the Administrator's order. Indeed, the law judge may not have been convinced of that either since she "edited" her decision to add language to the order specifying that the Administrator be permitted to conduct an "unconditional" inspection.

In short, respondent did everything that the cited FARs required it to do and nothing that any regulation proscribed it from doing. The Administrator's position that taping the inspections should not be permitted does not establish a violation of the regulations. *Pike v. C.A.B., supra.* We do not hold that an operator is free either to deny the Administrator access to its records or to physically interfere with an authorized inspection. Rather, we find that under the particular facts of this case the respondent's actions did not prevent or obstruct the Administrator's inspection of its records. Moreover, to the extent that this proceeding reflects an overreaction on both sides of the inspection issue, we do not condone the conduct of either party. The Administrator has an important function to perform in insuring aviation safety and the regulated industry should, and can be made to, cooperate in reasonable efforts by the Administrator to discharge his functions. If the Administrator believes that it is essential to bar the recording of inspections, he may wish to consider promulgating a regulation or taking any other appropriate action specifying the activities he intends to proscribe.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal be and it hereby is granted; and
2. The Administrator's order of suspension and the initial decision be and they hereby are reversed.

GOLDMAN, Acting Chairman, LAUBER, and NALL, Members of the Board, concurred in the above opinion and order. BURNETT, Member of the Board, did not participate.

STATUTES

5 U.S.C. § 504

§ 504. Costs and fees of parties

(a) (1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

(b) (1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partner-

ship, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association, as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, and (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607);

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication; and

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

28 U.S.C. § 2412

§ 2412. Costs and fees

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

* * * *

(d) (1) (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial

review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing

market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Claims Court;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement; and

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.

49 U.S.C. § 1429(a)

§ 1429. Reinspection or reexamination; amendment, suspension, or revocation of certification

(a) Procedure; notification; hearing; appeal to National Transportation Safety Board; judicial review

The Secretary of Transportation may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Secretary of Transportation, he determines that safety in air commerce or air transportation and the public interest requires, the Secretary of Transportation may issue an

order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Secretary of Transportation shall advise the holder thereof as to any charges or other reasons relied upon by the Secretary of Transportation for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Secretary of Transportation under this section may appeal the Secretary of Transportation's order to the National Transportation Safety Board and the National Transportation Safety Board may, after notice and hearing, amend, modify, or reverse the Secretary of Transportation's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Secretary of Transportation's order. In the conduct of its hearings the National Transportation Safety Board shall not be bound by findings of fact of the Secretary of Transportation. The filing of an appeal with the National Transportation Safety Board shall stay the effectiveness of the Secretary of Transportation's order unless the Secretary of Transportation advises the National Transportation Safety Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the National Transportation Safety Board shall finally dispose of the appeal within sixty days after being so advised by the Secretary of Transportation. The person substantially affected by the Na-

tional Transportation Safety Board's order may obtain judicial review of said order under the provisions of section 1486 of this title, and the Secretary of Transportation shall be made a party to such proceedings.

49 U.S.C. § 1485(a)

§ 1485. Orders, notices, and service

(a) Effective date of orders; emergency orders

Except as otherwise provided in this chapter, all orders, rules, and regulations of the Board or the Secretary of Transportation shall take effect within such reasonable time as the Board or Secretary of Transportation may prescribe, and shall continue in force until their further order, rule, or regulation, or for a specified period of time, as shall be prescribed in the order, rule, or regulation: *Provided,* That whenever the Secretary of Transportation is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the Secretary of Transportation is authorized, either upon complaint or his own initiative without complaint, at once, if he so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of safety in air commerce to meet such emergency: *Provided further,* That the Secretary of Transportation shall immediately initiate proceedings relating to the matters embraced in any such order, rule, or regulation, and shall, insofar as practicable, give preference to such proceedings over all others under this chapter.

No. 86-1573

In the Supreme Court of the United States

OCTOBER TERM, 1986

CONNER AIR LINES, INC., PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the court of appeals erred in denying its motion for attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d).

1. Petitioner is an air cargo carrier operating under a certificate of authority issued by the Federal Aviation Administration (FAA). On March 18, 1986, petitioner refused an FAA inspector's request to see records concerning the maintenance of one of its aircraft (Pet. App. 11a-12a, 13a). Petitioner subsequently agreed to make the records available for inspection on March 24, 1986, but only if it was permitted to record the inspection on audio- and videotape. FAA inspectors initially agreed to this procedure, but ultimately informed petitioner that the presence of the taping equipment interfered with the inspection. When petitioner refused to remove the taping equipment, the inspection ended. *Id.* at 12a-13a. Two days later, after petitioner again refused to permit the inspection to proceed in the absence of taping equipment, the FAA suspended petitioner's certificate of authority, treating petitioner's conduct as a refusal to allow inspection (*id.* at 13a). See 49 U.S.C. 1429(a).

Petitioner immediately challenged the FAA's order before the National Transportation Safety Board (NTSB or Board). Pending completion of those administrative proceedings, petitioner moved for an emergency stay of the FAA's order in the court of appeals. On April 4, 1986, a stay was granted by a divided panel of the Eleventh Circuit (Pet. App. 1a). Three days later, an NTSB administrative law judge [ALJ] rejected petitioner's challenge to the FAA's order, noting, among other things, that the members of an FAA inspection team must have an opportunity for contemporaneous, confidential discussions about their findings (see *id.* at 15a-16a n.14).

The ALJ's decision was in turn reversed by the NTSB (Pet. App. 5a-18a). Noting that the facts of the case were essentially undisputed (*id.* at 10a), the Board held that petitioner's "unobtrusive[] recording" would not have interfered with the FAA inspection (*ibid.*). The Board recognized that "[t]his issue presents a purely legal question of [statutory] interpretation and application which has not been addressed by the Board" (*id.* at 15a). And while the Board found "support in the record" for the ALJ's finding that petitioner had refused to allow FAA inspection of its records on March 18, 1986 (*id.* at 13a), the Board concluded that petitioner had adequately complied with FAA regulations by providing access to its documents on March 24, 1986, the day scheduled for the inspection (*ibid.*). "[U]nder the particular facts of this case," the NTSB stated, petitioner's actions on March 24 "did not prevent or obstruct the [FAA's] inspection of its records" (*id.* at 17a). The NTSB added that, "to the extent that this proceeding reflects an overreaction on both sides of the inspection issue, we do not condone the conduct of either party. The [FAA] has an important function to perform in insuring aviation safety and the regulated industry should, and can be made to, cooperate in reasonable efforts by the

[FAA] to discharge [its] functions" (*ibid.*). The government did not appeal from the Board's decision.

Petitioner then filed an application with the court of appeals for an award of fees under EAJA for work performed before that court in connection with the stay motion.[1] That application was denied by unpublished order (Pet. App. 3a). Petitioner's subsequent motion for reconsideration also was denied by order (*id.* at 4a).

2. Petitioner's fact-bound challenge to the denial of its fee request is without merit and does not warrant this Court's consideration. Petitioner appears to acknowledge (Pet. 13-14) that fees may not be awarded under EAJA when the government's administrative and litigation position was reasonable, even though that position did not prevail in court. See *United States* v. *Yoffe,* 775 F.2d 447, 449 (1st Cir. 1985) (citing cases). And the FAA's order here, although stayed by the court of appeals and ultimately rejected by the NTSB, plainly was reasonable. As the NTSB explained, the issue here—whether a carrier's insistence on taping a document inspection interferes with that inspection within the meaning of FAA regulations[2] —was one of first impression. The FAA interpretation of its regulations in this novel setting was upheld by an administrative law judge. The NTSB, while finding that petitioner's conduct was not proscribed by the regulations, noted petitioner's recalcitrance and emphasized the importance of the FAA mission of ensuring aviation safety. And Judge Johnson dissented from the court of appeals'

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[1] Petitioner also sought an award of fees from the NTSB for work performed before the agency; that application remains pending.

[2] Federal Aviation Regulation, 14 C.F.R. 121.81(a) (reprinted at Pet. App. 8a n.3) obligates certificate holders to allow the FAA, "at any time or place, to make any inspections or tests"; Federal Aviation Regulation, 14 C.F.R. 121.380(c) (reprinted at Pet. App. 8a-9a n.3) obligates certificate holders to "make all maintenance records * * * available for inspection" by the FAA.

decision even to grant a stay pending completion of the administrative process. In these circumstances, it is evident that informed minds could differ on whether the FAA acted properly in issuing its order; petitioner's fact-bound contention to the contrary (Pet. 10-15) presents no significant legal question.[3]

Petitioner's further argument (Pet. 15-18) that the court of appeals somehow abused its discretion in summarily disposing of the fee request by order is equally without merit. The EAJA contains no requirement that courts produce written opinions when they deny fee requests. Nor was there any need here for detailed factual findings, as petitioner seems to suggest (Pet. 16-17); as the NTSB explained, the facts in this case were not in dispute. The panel of the court of appeals that denied petitioner's fee request—the same panel that had *granted* its stay motion by a divided vote—had before it petitioner's application and the FAA's response; there is no reason to doubt that the court considered those materials in concluding that petitioner was not entitled to fees.

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[3] We note that there is no need to hold this case pending disposition of *Pierce* v. *Underwood*, cert. granted, No. 86-1512 (May 18, 1987), which presents the question whether EAJA fees may be awarded despite the existence of certain objective indicia that the government's position was reasonable. In this case, there is no dispute about the propriety of the standard applied by the court of appeals in judging petitioner's fee request; petitioner acknowledges that "[f]or purposes of determining whether the agency's position was substantially justified, the test is one of reasonableness" (Pet. 13). Here, moreover, the objective indicia—a dissent by one member of the court of appeals panel, and the FAA's victory before the administrative law judge in parallel administrative proceedings—plainly support the reasonableness of the government's position. And while the court of appeals' decision to grant a stay may represent a judgment that petitioner's position had some merit, that is hardly identical to a judgment that the government's position lacked *any* merit, a conclusion that petitioner would have to establish in order to prevail.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JUNE 1987

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No. 86-1573

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CONNER AIR LINES, INC.,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,
UNITED STATES SECRETARY OF TRANSPORTATION,
R. R. HAGDONE, Regional Counsel,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I

Is the interpretation of a statute or regulation by the agency charged with administering that statute entitled to great deference by this Court?

II

Can a Federal agency escape liability for attorney fees under the Equal Access to Justice Act by merely showing that its action had a rational basis, or must it show that its action had a solid basis?

III

Does a recent decision by this Court to grant certiorari in a related case warrant the granting of Petitioner's Writ of Certiorari?

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Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ADDITIONAL BASIS FOR GRANTING THE WRIT

A. The Recent Decision By The National Transportation Safety Board Awarding Attorney Fees And Expenses To Petitioner Under The Equal Access To Justice Act Should Be Afforded Great Weight By This Court.

This supplement is respectfully submitted to the Court pursuant to Supreme Court Rule 22.6 in order to present new cases and authorities which were not available at the time the Petition for Writ of Certiorari was filed on March 31, 1987.

The underlying case which gives rise to this petition involved separate proceedings before the National Transportation Safety Board ("NTSB") and the United States

Court of Appeals for the Eleventh Circuit. When the Federal Aviation Administration ("FAA") suspended Petitioner's operating authority on an emergency basis, Petitioner pursued its remedies by (1) a proceeding on the merits of the alleged regulatory violations before the NTSB and (2) a simultaneous proceeding before the Eleventh Circuit seeking relief from the immediate effect of the suspension. When the FAA designates a suspension action as an emergency, the normal procedures, which automatically stay the effect of the suspension pending a decision on the merits by the NTSB, do not apply. Moreover, the NTSB does not have jurisdiction to grant a stay in an emergency case. Thus, the certificate holder must seek such relief from the appropriate United States Court of Appeals.

As a result of pursuing the above remedies, Petitioner (1) obtained a stay from the Eleventh Circuit pending NTSB review and then (2) prevailed before the NTSB on the merits. The Equal Access To Justice Act ("EAJA") requires an applicant for an award of attorney fees to make a separate application to each court or administrative agency before which the legal services in question were performed. Accordingly, Petitioner submitted separate EAJA applications to the Eleventh Circuit and the NTSB.

The Eleventh Circuit denied Petitioner's EAJA application. That denial is the decision which Petitioner is asking this Court to review. Following the filing of the petition with this Court, the NTSB issued a decision granting Petitioner's EAJA application for services rendered before the NTSB. In so doing, the NTSB applied and interpreted the same regulations and statutes which were involved in the proceeding before the Eleventh Circuit. Such an interpretation of the statutes and regulations by the agency charged with administering the statute is clearly relevant to this Court. Consequently, it has become necessary to supplement the petition pending before this Court.

The NTSB decision was issued June 5, 1987, and it is entitled *Conner Air Lines, Inc. v. Donald D. Engen, Administrator, Federal Aviation Administration*, NTSB Order No. EA-2531 (June 5, 1987). By this decision, the NTSB found Petitioner eligible for an award of attorney fees and expenses pursuant to the EAJA. Since the NTSB's decision is not a reported one, the decision has been reprinted in the Supplemental Appendix at the end of this document. The decision by the NTSB concludes:

> The Administrator has not established that he was substantially justified in ordering the suspension of the applicant's operating certificate and the airworthiness certificate of its aircraft.

See Supplemental Appendix at SA-2.

This decision by the NTSB has direct application to the issue before this Court. It has long been the rule that a court must give considerable deference to an agency's interpretation and construction of its own statutes. *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985). Additionally, this rule of law is more vital, and deference even more important, when the agency is interpreting its own regulations. In fact, it has been held that the ultimate criterion is the administrative interpretation by an agency of its own regulation. *United States v. Larionoff*, 431 U.S. 864, 872 (1977). A court should defer to an agency's interpretation unless the legislative history or purpose of the statute clearly reveals a contrary intent on the part of Congress. *Chemical Manufacturers Association*, 470 U.S. at 126.

The law is clear. The agency's interpretation of the law as it relates to its regulations is quite persuasive and this Court should have the benefit of reviewing the NTSB's ruling. *E.I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977).

Moreover, this Court should give great weight to the NTSB's determination. The NTSB is charged with administering the statute and the regulations in question. The heart of the NTSB opinion states:

> The Administrator has *no reasonable basis in law or in fact* for the view that the regulations proscribed the unobtrusive taping of the inspection records.

See Supplemental Appendix at SA-3 (emphasis added). The NTSB found that there was no rational basis for the FAA to believe that the taping would intrude upon the inspection process. That belief was the sole basis for the FAA issuing the Emergency Order of Suspension. Thus, this Court should give great deference to the determination of the NTSB in its application of the law to these facts.

The underlying action before the NTSB involved the question of whether certain regulations were violated. The underlying action before the Eleventh Circuit involved the question of whether the FAA properly found that an emergency existed due to those alleged regulatory violations. While these two questions are different, they are inextricably intertwined. If there was no basis in law or fact for the FAA to allege that the regulations had been violated, there certainly was no reasonable basis on which to conclude that there was an emergency requiring the immediate suspension of Petitioner's operations.

B. In Order For the Federal Aviation Administration To Be Substantially Justified In Taking The Action It Did Against Petitioner, The Agency's Position Must Be Shown To Have Had More Than Just A Reasonable Basis In Law And Fact.

Since the filing of the petition with this Court, the United States Court of Appeals for the Sixth Circuit has issued its decision in *Riddle v. Secretary of Health and Human Services*, No. 86-5228 (6th Cir. May 1, 1987).

After conducting an in-depth analysis of the legislative history of the EAJA, the Sixth Circuit held that:

> In order to be substantially justified, the government's position must have *more* than a "reasonable basis" in law and fact. *Instead, the government's position must be firmly grounded or solidly based in law and fact.*

Id. at 12 (emphasis supplied).

The court in *Riddle* reversed the District Court for the Western District of Kentucky, which had applied the rational basis standard, and refused to equate the rational basis standard with the substantially justified standard. *Id.* The Sixth Circuit also stated that the adjective "substantial" connotes a meaning which indicates that which is sturdy, solid or firm and not imaginary or illusive. *Id.* at 5.

In the case at bar, the FAA clearly had no "solid basis" on which to rely. As the NTSB stated in Order No. EA-2531:

> In rejecting the Administrator's position that the applicant violated the regulations by unobtrusively recording the Administrator's inspection of the applicant's records at its place of business, the Board found that the applicant did everything that the regulations cited in the complaint required it to do, that the applicant did nothing that the regulations proscribed, that the Administrator's action was an impermissible attempt to rewrite the regulations and apply them retroactively, and that the Administrator's reliance on cases dealing with different regulations on access to the observer's seat in cockpit for enroute inspections was misplaced.

See Supplemental Appendix at SA-3. The *Riddle* court clearly pointed out that Congress undeniably rejected the rational basis standard in favor of the substantially justified test. *Id.* at 7-12. The FAA failed to meet this

stringent burden and the Eleventh Circuit erred in not granting Petitioner's EAJA application.

C. This Court's Recent Decision To Grant Certiorari In A Related Case Warrants The Grant Of Certiorari In The Case At Bar.

Since the filing of the petition herein, the Court has granted certiorari in *Pierce v. Underwood*, 802 F.2d 1107 (9th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3768 (U.S. May 19, 1987) (No. 86-1512). The *Underwood* case also involves the EAJA. In its petition for writ of certiorari in *Underwood*, the Government argues that a court in ruling on an EAJA application should look for "objective indicia" that the Government's position was substantially justified. The Government asserts that there is an "objective indicia" in *Underwood* in that a stay was granted earlier by the Supreme Court. Hence, it is argued that the Ninth Circuit's decision to grant attorney fees is erroneous.

In the case at bar, the Eleventh Circuit granted a stay of the FAA's emergency order. This was the first time ever that a court determined that the FAA's exercise of its emergency authority was an abuse of discretion and thus arbitrary and capricious. *See* Petition for Writ of Certiorari at 7-8. Thus, the very criteria which the Government urges this Court to adopt in *Underwood* supports a finding that the Government's position was not substantially justified in the case at bar. If this Court decides not to grant the Petition for Writ of Certiorari, independently in this case, Petitioner respectfully requests that the case at bar be considered jointly with *Underwood.*

CONCLUSION

This Court should give great deference to the NTSB's decision ordering payment of attorney fees to Petitioner under the EAJA. That decision clearly shows the error of the Eleventh Circuit in denying Petitioner's EAJA application. In light of the recent decisions by this Court, the NTSB, and the Sixth Circuit, this Court should grant the Petition for Writ of Certiorari, remand the case to the Eleventh Circuit for further proceedings, or summarily reverse the Eleventh Circuit's order.

Dated: June 17, 1987

Respectfully Submitted,

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SUPPLEMENTAL APPENDIX

Served: June 5, 1987

NTSB Order No. EA-2531

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD at its office in Washington, D.C. on the 15th day of May, 1987

Docket 37-EAJA-SE-7342

CONNER AIR LINES, INC.,
Applicant,

v.

DONALD D. ENGEN, Administrator,
Federal Aviation Administration,
Respondent.

OPINION AND ORDER

The applicant has appealed from the initial decision [1] of Administrative Law Judge Joyce Capps, served December 19, 1986, denying its application for attorney fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 and the Board's rules implementing that Act (49 C.F.R. Part 826). The law judge determined that the applicant was a prevailing party and met all of the eligibility requirements for an award, but she denied the application concluding that the Federal Aviation Administration (FAA) was "substantially justified" in issuing the emergency order which sus-

[1] A copy of the initial decision is attached.

pended the applicant's Air Carrier Operating Certificate and the airworthiness certificates of six aircraft.[2]

In its brief, the applicant contends that the FAA failed to meet its burden of proof to show that its actions were substantially justified because there was no reasonable basis in truth for the disputed facts alleged in the complaint, there was no reasonable basis in law for the FAA's theory that the applicant's insistence on taping the record examination amounted to a refusal to allow the FAA to conduct an inspection of the airline and its aircraft, and the facts alleged in the complaint do not reasonably support the legal theories advanced by the FAA. The applicant also contends that the law judge's opinion does not support a finding that the FAA's actions were substantially justified. The Administrator has filed a reply brief opposing the appeal and requesting affirmance of the initial decision.

Upon consideration of the entire record, the Board concludes that the Administrator has not established that he was substantially justified in ordering the suspension of the applicant's operating certificate and the airworthiness certificate of its aircraft. Therefore we reverse the initial decision.

The pertinent facts are recited in the Board's underlying decision and only will be briefly outlined herein. The Administrator requested that the applicant make available for inspection specified maintenance records for six aircraft. The applicant made all of the requested records available on March 24, 1986, the date specified by the Administrator. The head of the FAA inspection team consented to the applicant's use of an audio recorder

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[2] Under the EAJA, as amended, an eligible party shall be awarded attorney fees and other expenses when it prevails over the agency unless "the position of the agency was substantially justified" or "special circumstances make an award unjust". 5 U.S.C. § 504 (a) (1).

during the examination of records at the applicant's place of business, and the applicant also openly used a video recorder during the inspection. After a lunch break, the team leader objected to the use of the video recorder, and the FAA took the position that it would refuse to continue the inspection unless the applicant removed the audio and video recorders. The emergency order of suspension was premised on the FAA's view that the applicant's insistence on recording the inspection while at the same time providing complete access to its records constituted a refusal to make the records available and to allow the inspection.[3]

In rejecting the Administrator's position that the applicant violated the regulations by unobtrusively recording the Administrator's inspection of the applicant's records at its place of business, the Board found that the applicant did everything that the regulations cited in the complaint required it to do, that the applicant did nothing that the regulations proscribed, that the Administrator's action was an impermissible attempt to rewrite the regulations and apply them retroactively, and that the Administrator's reliance on cases dealing with different regulations on access to the observer's seat in the cockpit for enroute inspections was misplaced.

The Administrator had no reasonable basis in law or fact for the view that the regulations proscribed the unobtrusive taping of the inspection of records. Moreover, the cases applying the enroute inspection rules undercut rather than supported the Administrator's action in this

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[3] The applicant successfully had completed two years under the National Air Transportation Inspection program, and less than one month before the record examination in question in this case, the FAA had notified the applicant that its records and operations were in good shape. Moreover, there is no evidence that the inspection team discovered any problems, discrepancies, or violation of any regulations during the inspection on the morning of March 24, 1986.

case because those rules, unlike the rules at issue in this case, clearly addressed the manner in which compliance was to be achieved. Despite vigorously arguing that the taping of the record examination thwarted and prevented the inspection, the Administrator has not addressed the following reasoning the Board relied on to reverse the Administrator's complaint:

> "The Administrator has not explained what additional intrusion the audio and video recording conducted herein would impose beyond the not unauthorized presence of the operator's representative while an inspection is in progress." (Opinion and Order, p.12, fn. omitted).

The Administrator has not explained and presumably has no explanation to justify treating the open taping of a record inspection any differently from the permissible observation of the inspection by agents of the carrier.[4]

ACCORDINGLY, IT IS ORDERED THAT:

1. The applicant's appeal is granted;
2. The initial decision is reversed; and
3. The matter is remanded to the law judge for the purpose of deciding the attorney fees and expenses to be awarded.

BURNETT, Chairman, GOLDMAN, Vice Chairman, LAUBER and NAIL, Members of the Board, concurred in the above opinion and order.

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[4] The law judge did not have to reach the question of whether special circumstances make an award unjust, and we do not find such circumstances present in this case.

Served: December 19, 1986

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

Docket 37-EAJA-SE-7342

CONNER AIR LINES, INC.
Applicant

vs.

DONALD D. ENGEN, Administrator
Federal Aviation Administration
Respondent

Mark T. McDermott, Esq. and *Arvind K. Lal*, Esq., for the applicant.

Richard Lewis Faber, Esq., for the Administrator.

INITIAL DECISION AND ORDER DENYING APPLICATION FOR ATTORNEY FEES AND OTHER EXPENSES

JOYCE CAPPS, Administrative Law Judge:

Pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. 504 *et seq.*, and the Board's implementing rules thereunder, 49 CFR 826.1 *et seq.*, the above-named applicant has applied for an award of attorney fees and other expenses against the Federal Aviation Administration (FAA), an agency of the United States.

By Emergency Order of Suspension dated March 26, 1986, the FAA suspended the applicant's Air Carrier Operating Certificate and the airworthiness certificates of six aircraft due to its alleged violation of Section 121.81 in that it refused to the Administrator his right

to make inspections of the applicant's operation and of Section 121.380(c) by refusing to make available to the Administrator the maintenance records of the six aircraft for inspection. Said certificates were ordered suspended until such time as the applicant permitted the Administrator to conduct the pertinent inspections in a free and uninterrupted manner, including the absence of video and/or audio taping of inspectors while conducting the inspections.

The underlying issue at hearing was what constitutes an inspection within the meaning of the regulations? It was determined by this judge in a bench decision that the applicant was in violations of the cited regulations, the rationale being (1) that inspectors are entitled to conduct inspections with a reasonable degree of privacy among themselves, and (2) that the Administrator's right to inspect at reasonable times and places is an unconditional right. The time and place for the inspection was agreed to by the parties. In the final analysis, it was the opinion of this judge that the applicant's insistence that the inspections must be videotaped (a condition that was unacceptable to the Administrator) was tantamount to a refusal by the applicant to permit the inspections involved.

The Oral Initial Decision and Order was reversed by the Board in NTSB Order No. EA-2335 (June 2, 1986), *reconsideration denied*, NTSB Order No. EA-2379 (Aug. 6, 1986). Thus, the applicant is a prevailing party. It is noted also that the Application and supporting documents filed by the applicant establish that it meets all eligibility requirements set forth in the Act and the Board's Rules, and that the Application is both timely filed and procedurally correct.

However, an otherwise eligible party may not receive an award of attorney fees and other expenses if it is shown that the FAA's action was "substantially justified" within the meaning of Section 504(a)(1) of the EAJA.

This was a case of first impression as to whether the applicant's insistence on video taping the inspection (i.e., establishing a condition precedent to an inspection) was tantamount to a refusal to allow inspection. The FAA had a right and duty to bring this action for an adjudication of that issue. I obviously think the FAA's action had a reasonable basis both in law and fact and was not "weak" or "tenuous" since I agreed with it. The fact that the Board disagreed with my interpretation of what constitutes an inspection makes the FAA's action no less responsible, reasonable, and justified.

The essential facts in this case are not in dispute. The commencement of this action was neither arbitrary nor capricious. Rather, it was a necessary and proper step in having the legal issue adjudicated. That has been done and the Board has spoken and laid that issue to rest. We now have precedent to guide the Administrator, attorneys, and judges in future similar situations. Furthermore, the decision of the U. S. Court of Appeals for the Eleventh Circuit as to the "emergency nature" of the case is extraneous to the precise issue of whether the FAA's action against the applicant was "substantially justified."

It should be noted that this decision renders moot the motion and response thereto involving claimed time for a luncheon which occurred on April 3, 1986.

It having been found that the FAA's position was substantially justified, it is concluded that the applicant is not entitled to an award of attorney fees and other expenses under the EAJA. Therefore, it is

ORDERED, That the application for attorney fees and other expenses is hereby denied.

Entered this 19th day of December, 1986.

/s/ Joyce Capps
JOYCE CAPPS
Administrative Law Judge